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ORIGINAL

No. 85-958 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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SUPREME COURT, U.S.

STATE OF ILLINOIS,

Petitioner,

vs.

LARRY W. EYLER,

Respondent.

On Petition For A Writ Of Certiorari To
The Appellate Court of Illinois,
Second Judicial District

MEMORANDUM FOR THE RESPONDENT, LARRY W. EYLER IN OPPOSITION

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TABLE OF CONTENTS

Page No.

Table Of Authorities ii

Memorandum For The Respondent, Larry W. Eyler In Opposition. 1

Conclusion 6

TABLE OF AUTHORITIES

	Page No.
Brown v. Illinois, 422 U.S. 590 (1975).	5
Nix v. Williams, ____ U.S. ____, 104 S.Ct. 2501 (1984).	5
People v. Eyler, 132 Ill.App.3d 792, 477 N.E.2d 774 (2d Dist. 1985)	3
Rios v. United States, 364 U.S. 253 (1960).	3
Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963)	5
Wong Sun v. United States, 371 U.S. 471 (1963). . . .	5
United States v. Brown, 628 F.2d 1019 (7th Cir. 1980)	4
United States v. Ceccolini, 435 U.S. 268 (1978) . . .	3, 4
United States v. Greer, 566 F.2d 472 (5th Cir.), cert. denied, 435 U.S. 1009 (1978).	4
United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967), cert. denied, 390 U.S. 1031 (1968)	4
United States v. Houlton, 566 F.2d 1027 (5th Cir. 1978)	5
United States v. Marder, 474 F.2d 1192 (5th Cir. 1967)	5

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MEMORANDUM FOR THE RESPONDENT, LARRY W. EYLER IN OPPOSITION

Petitioner admits that the Respondent's arrest was illegal, but asks this Court to grant certiorari to determine whether and under what circumstances, continued detention of a citizen may be permitted, if the police subsequently come into possession of facts which provide probable cause to arrest for a separate offense. Specifically, the State alleges that the probable cause to support the Respondent's arrest for a totally independent and unforseeable crime was established after his illegal detention as a consequence of certain statements made by his travelling companion. In addition, the State argues that the statements of that companion were not tainted by the illegality of the original arrest, but were attenuated by subsequent events. (Petition, pp. 13, 14).

In an effort to attenuate the taint of illegality, the State

suggests that the Indiana State Police after the admittedly illegal arrest of the Respondent, obtained information concerning possible solicitation of prostitution from Mr. Hayward, a passenger in the Respondent's car at the time of his detention. The State argues that this information, though subsequently obtained, constituted ab initio sufficient probable cause to arrest and subsequently search the Respondent and his vehicle.[1/]

Though the Petitioner claims that the information was forthcoming before the Respondent was ever transported to the police station, the fact-finding trial court concluded that it was not obtained until after the Respondent had been illegally arrested, jailed and his property seized. (R. 1019). That finding is supported by the State's evidence. Officer Popplewell testified at the hearing that he and Hayward remained at the scheme talking for twenty to twenty-five minutes (R. 230); and it was at least another hour after they arrived at the Lowell, Indiana police station before Hayward finally gave a statement. (R. 255, 344).

There is no doubt that the very existence of Mr. Hayward did not come to light except as a direct result of the Respondent's illegal detention. During the initial stop and questioning, Mr. Hayward remained in the truck out of view of the police officers. (R. 273). It was only after the Respondent had been arrested, that the police removed Hayward from the truck, searched him, handcuffed him and put him into a police vehicle. (R. 222, 279). At that time he was told that the Respondent was a suspect in homosexual murders and that Hayward himself was a "possible accomplice". (R. 226, 247). Confronted with that knowledge, the prisoner began "cooperating"; and stated that the Respondent had

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1/ Significantly, the Respondent was never charged with that crime. (R. 1018).

offered him one hundred dollars in return for sex. (R. 228).

This Court has held that if an illegal arrest occurs without probable cause, nothing that occurs thereafter can make that arrest lawful or justify any search ab initio as incident to it. Rios v. United States, 364 U.S. 253, 261, 262 (1960).

Clearly in this case there is little likelihood that the police would have discovered the witness without the Respondent's arrest. Furthermore, he was himself a putative defendant and under great pressure at the time he was interrogated by the police as to his connection with the Respondent. Examining all of the facts surrounding the discovery and interrogation of Mr. Hayward, it is clear that his information was not "sufficiently unrelated to or independent of the constitutional violation . . .". United States v. Ceccolini, 435 U.S. 268, 278 (1978).

The Illinois Appellate Court not only recognized this Court's opinion in Ceccolini, supra, but also properly applied the rational of that case to the facts before it. In this connection, the Illinois Appellate Court characterized the issue presented as follows:

> Although the trial court found that Hayward's statement was tainted by the defendant's illegal detention, the State argues that the statement was attenuated from any taint because it was a product of a live witness subject to the exercise of free will. United States v. Ceccolini (1978), 435 U.S. 268, 98 S.Ct. 1055, 55 L.Ed.2d 268.

People v. Eyler, 132 Ill.App.3d 792, 477 N.E.2d 774, 785 (2d Dist. 1985). Furthermore, after analyzing the facts, the Illinois Appellate Court concluded:

> The facts demonstrate that Hayward was removed from the defendant's truck, searched, and handcuffed after the defendant was illegally arrested. Confronted with the knowledge of being a "possible accomplice" in homosexual murders, Hayward began "cooperating." While Hayward expressed a desire to assist the police, his statement was not sufficiently the product of free will to have dissipated the taint from the defendant's illegal arrest. (United

> States v. Ceccolini, (1978), 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268). Hayward made his statement within minutes of the defendant's illegal arrest while restrained in a police car. There was evidence that Popplewell questioned Hayward with the intent of obtaining information regarding the murders.
>
> The trial court's finding that there was a direct "nexus" between the illegal arrest of the defendant and the subsequent statement made by Hayward is supported by the evidence. Hayward's statement was obtained by an exploitation of the illegal arrest and not by means sufficiently distinguishable to be purged of the primary taint from the illegality.

Ibid.

The Petitioner cites two cases, United States v. Brown, 628 F.2d 1019 (7th Cir. 1980) and United States v. Greer, 566 F.2d 472 (5th Cir.), cert. denied, 435 U.S. 1009 (1978) to support its position. However, in both cases, the courts found that the taint of the defendant's original illegal arrest was purged because they found independent and unrelated actions of a third party rather than the illegal police conduct which gave rise to the probable cause for the subsequent arrest.

Mr. Hayward was seized as a "direct consequence of the illegal arrest and detention for those investigative purposes." (R. 1017). Moreover, the trial court found that his detention and interrogation was further tainted by the illegal search of the Respondent's truck which disclosed material inside of a bag. (R. 1016). Clearly, then, there was a direct nexus between the illegal arrest of the Respondent and the subsequent statement which his passenger gave to the police - that factor is fatal to the Petitioner's position.

Nor is there any evidence that the witness would have come forward "by his own volition regardless of his identification by the illegal search." United States v. Marder, 474 F.2d 1192, 1196 (5th Cir. 1973): See also, United States v. Hoffman, 385 F.2d 501, 504 (7th Cir. 1967), cert. denied, 390 U.S. 1031

(1968). In this respect the facts presented below differ vitally from cases in which only the identity of a witness is learned during the course of an illegal detention. Then the taint may be attenuated because the witness later comes forward independently and voluntarily to produce the same evidence. See e.g., Smith v. United States, 324 F.2d 879, 881-82 (D.C. Cir. 1963); United States v. Houltin, 566 F.2d 1027, 1032 (5th Cir. 1978).

In this case, the very existence of the passenger and his relationship to the Respondent arose directly and solely as a result of the illegal arrest. Further, the decision to take the passenger into custody and to question him followed directly from an illegal search of the truck during the course of which a bag was found containing tape and rope. Any later probable cause that might have arisen as a result of interrogating the passenger was itself clearly infected by the illegality of the original arrest and search. Wong Sun v. United States, 371 U.S. 471 (1963). Any other result will encourage the police to stop at random in the hope that during the course of an investigation something might "turn up" which would establish probable cause to arrest. That is precisely what this Court condemned in Brown v. Illinois, 422 U.S. 590, 605 (1975).

Finally, the Petitioner argues that the evidence suppressed below would have been "inevitably discovered," Nix v. Williams, ___ U.S. ___, 104 S.Ct. 2501 (1984). (Petition, p. 14). Obviously, but for the illegal detention of the Respondent, the Indiana Police would have been totally unaware of the existence or nature of any of the evidence that was seized at that time.

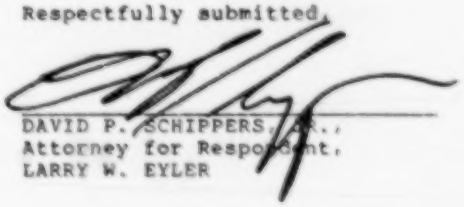
It is to be noted that Petitioner argued in the Illinois courts that the Respondent was legally arrested and later gave a valid consent to search. It was suggested that the consent search would inevitably have resulted in finding the material which had been illegally seized earlier. On the other hand,

since the Respondent's consent to search his truck was tainted by the illegality of his original arrest and was constitutionally ineffective, the doctrine of inevitable discovery is of no value to the Petitioner in this case.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition For A Writ Of Certiorari be denied.

Respectfully submitted,



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